

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Advanced Television Systems)	MB Docket No. 87-268
and Their Impact upon the)	
Existing Television Broadcast Service)	

TO: The Secretary
ATTN: The Commission

**COMMENTS OF FLATHEAD ADVENTIST RADIO, INC.
ON THE
SEVENTH FURTHER NOTICE OF PROPOSED RULEMAKING**

Flathead Adventist Radio, Inc. (“FAR”), by counsel, hereby submits the following Comments in response to the FCC’s *Seventh Further Notice of Proposed Rulemaking* (the “NPRM”) in the Advanced Television Systems rulemaking proceeding, MB Docket No. 87-268.¹ FAR has an application pending for a construction permit for a new digital noncommercial educational television station on Channel *46 at Kalispell, Montana.² With the NPRM, the Commission released its proposed permanent post-transition Digital Television Table of Allotments, and invited public comment about it. Channel *46 at Kalispell has been omitted from

¹FCC 06-150, released October 20, 2006.

²File No. BNPEDT-20060810ABD.

that Table of Allotments. FAR submits these Comments to oppose that omission and to urge the Commission to add Channel *46 at Kalispell on the post-transition Table. In support whereof, the following is stated:

1. In March, 2004, Montana State University (“MSU”) submitted a Petition for Rulemaking in which it proposed the addition of reserved noncommercial educational Channel *46 at Kalispell on the initial DTV Table of Allotments. The Petitioner demonstrated that no local noncommercial television service existed at Kalispell and that the proposed allotment would provide a first noncommercial educational TV service to 143,020 persons, representing 100% of the population calculated to reside within the allotment’s 41 dBu contour.³ MSU averred that there would be considerable public interest value in adding an allotment to the DTV Table that would so significantly reduce noncommercial educational television white area.

2. In response to MSU’s Petition for Rulemaking, the Commission released a *Notice of Proposed Rule Making* on July 30, 2004 in which it proposed to adopt MSU’s proposal and solicited public comment.⁴ In due course, the Commission adopted the proposal in its November, 2004, *Report and Order* in Docket 04-283. In doing so, the agency said, “We believe the public interest would be served by allotting DTV channel *46 to Kalispell since it would provide the community with

³See, Petition for Rulemaking of Montana State University, MB Docket 04-283, RM-10965, filed March 24, 2004, at p. 3.

⁴19 FCC Rcd 14440 (M.Bur., 2004).

its first local noncommercial educational television service.”⁵ Channel *46 was added to the Table set out in Section 73.622 of the Commission’s rules.

⁵19 FCC Rcd 23149 (M.Bur., 2004).

3. Almost two years later, the Commission initiated the process of activating service on the Kalispell allotment. A Public Notice was released in July, 2006, soliciting applications for a new noncommercial digital television station to occupy the channel.⁶ FAR filed its application in response to that Public Notice. A mutually exclusive application was also filed by MSU, under the designation of the Board of Regents of the Montana University System.⁷

4. Following the above-described series of events that induced FAR and MSU to expend the time and resources to submit applications for a new station, FAR is surprised to learn that the new post-transition DTV Table does not include Channel *46 at Kalispell. This omission (as well as those of numerous other recently added allotments) is not directly explained in the NPRM. Although there is a discussion of the treatment of new licensees and permittees, and applicants for new stations in ¶¶50-53 of the NPRM, this passage is directed at NTSC licensees, permittees and applicants – and *not* at digital applicants. This seems evident from the reference in

⁶21 FCC Rcd 7183 (M.Bur., 2006). The Public Notice also invited interested parties to submit applications for Channel *21 at Great Falls, Montana, and Channel *16 at Billings, Montana.

⁷File No. BNPEDT-20060809AJQ.

the passage to ¶66 of the *Second DTV Periodic Report and Order*,⁸ where the Commission discussed the procedures for dealing with pending applications for some 50 new NTSC stations, and from the repeated references to NTSC channels.

⁸*Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 19 FCC Rcd 19279, at 18307 (2004).

5. In point of fact, the Commission quite explicitly stated its plan for dealing with digital proposals that will not have matured to actual authorizations by the time that the post-transition Table of Allotments is to be designed. That plan is found in ¶67 of the *Second DTV Periodic Report and Order*.⁹ Such proposals were divided into three categories: (1) pending petitions for rulemaking; (2) outstanding rule makings; and (3) completed rule makings that now have pending applications for construction permits. About these classes of proposals, the Commission said:

We will attempt to protect [in the post-transition Table] allotments and proposed allotments in the second and third groups where we have already adopted a Notice of Proposed Rule Making or a Report and Order to establish a channel allotment. Protection of these rule making proceedings is consistent with the requirements placed on DTV applications by Section 73.623(h)(2) of the rules. However, we advise these petitioners that there may be a few cases where we must modify, restrict or eliminate their requested allotment in order to accommodate all eligible broadcasters with a post-transition DTV allotment.¹⁰

6. Channel *46 at Kalispell clearly falls in the third category of DTV proposals. The rulemaking proceeding has been concluded and applications are pending on the channel. The Commission said that it would attempt to protect such proposals in the post-transition Table of Allotments. The agency did allow itself the flexibility to modify or eliminate such allotments in the “few cases” where they are precluded by the needs of established stations. If Channel *46 at Kalispell was

⁹*Ibid.*

¹⁰*Ibid.*, at 18308.

precluded by some other allotment in the final Table as proposed, the Commission should say so and explain the circumstances. In fact, there is no such preclusion in the Table. There is only the Commission's silence. The Table does not include Channel *46, and there is no explanation as to why. This development is inconsistent with the Commission's own self-appointed plan for dealing with these precise facts as stated in the *Second DTV Periodic Report and Order*. It also appears to be contrary to the Commission's commitment in ¶53 of the NPRM to establish new pleading cycles and opportunities for comment in cases where specific channels pose problems. Adoption of the Table as proposed under these circumstances is a self-inflicted injury to the Commission's credibility, and is a gross injustice to petitioners and applicants who have spent their time and resources in good faith pursuit of DTV authorizations. The Commission should add Channel *46 (or an alternate channel) at Kalispell to the post-transition Table of Allotments, or explain why that is not feasible. At the very least, there should be a pleading cycle for parties to attempt to demonstrate the viability of another channel if Channel *46 is problematic.

7. If the Commission intends to apply the statement in ¶50 of the NPRM (that "applicants for new stations and petitioners for new allotments would not be allowed to make channel elections . . .") to those with pending DTV applications, the agency will turn more than a half century of broadcast practice and procedure on its head. Allotments recently added through the regular rulemaking process should be considered "elections" for the purpose of designing the post-transition

Table. Since the adoption of the original Table of Allotments, an application cannot be filed unless it is associated with an appropriately approved and finalized allotment. Applications simply do not float through space, hoping to corral an allotment after grant. The certainty of an existing allotment gives applicants the motive and incentive to propose and pursue a new station authorization. The lack of that certainty for current DTV applicants with no permanent allotment home is a glaring hazard. Of course, if a currently pending application results in a permit before the expiration of the initial Table of Allotments in February, 2009, that permittee will have an allotment until then. If an application is not granted until after February, 2009, there would be no place to roost at all. In either case, the prevailing applicant will have achieved a hollow victory. There is no certainty that an allotment that can permanently accommodate the application as proposed and granted will exist or could be fashioned at that time. Such a process defies common sense, would be unfair to applicants, and is burdened with catastrophic economic disincentives.

8. FAR has pursued an opportunity create a new DTV station and to provide a new broadcast service to Kalispell in good faith, following the rules and procedures previously established by the Commission. The Commission cannot now abruptly change its process and renege on its commitments to DTV petitioners and applicants at this critical phase of the digital transition. FAR urges the FCC to add Channel *46 at Kalispell, Montana to the post-transition DTV Table of Allotments.

Respectfully submitted,

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